

TIANO O'DELL PLC

Experience you want. Results you need.

info@tolawfirm.com | tolawfirm.com | p 304.720.6700 | f 304.720.5800 | 118 Capitol Street | PO Box 11830 | Charleston, WV 25339

August 21, 2019

Via Certified Mail #7016 3010 0000 9010 7489

U.S. Dept. of Veterans Affairs
Office of Chief Counsel
251 North Main Street
Winston-Salem, NC 27155

RE: My Client: Estate of Felix K. McDermott

Dear Madam or Sir:

Enclosed please find the following documents:

- Form SF95, including separate "Basis of Claim";
- Letter of Administration;
- Autopsy Report;
- Funeral bill;
- Death Certificate.

If you have any questions or concerns, please do not hesitate to contact my office.

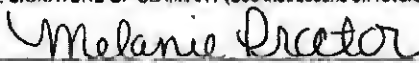
Very truly yours,



Tony O'Dell

TLO/tlb

Enclosures

CLAIM FOR DAMAGE, INJURY, OR DEATH		INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.		FORM APPROVED OMB NO. 1105-0008	
1. Submit to Appropriate Federal Agency: U.S. Dept. of Veterans Affairs Office of Chief Counsel 251 North Main Street Winston-Salem, NC 27155			2. Name, address of claimant, and claimant's personal representative if any. (See instructions on reverse). Number, Street, City, State and Zip code. Melanie Proctor, as Admin. of Estate of Felix K. McDermott, 1270 McKim Creek Rd., Ellenboro, WV 26346 - appt paper Tony O'Dell, Esq., Tiano O'Dell, PLLC, P.O. Box 11830, 118 Capitol St., Charleston, WV 25539		
3. TYPE OF EMPLOYMENT <input type="checkbox"/> MILITARY <input checked="" type="checkbox"/> CIVILIAN		4. DATE OF BIRTH 11/16/1935	5. MARITAL STATUS Widower	6. DATE AND DAY OF ACCIDENT 04/09/2018 Monday	
7. TIME (A.M. OR P.M.) 1:00 am					
8. BASIS OF CLAIM (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof. Use additional pages if necessary). See attached "Basis of Claim".					
9. PROPERTY DAMAGE					
NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code). Not applicable					
BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF THE DAMAGE AND THE LOCATION OF WHERE THE PROPERTY MAY BE INSPECTED. (See instructions on reverse side). Not applicable					
10. PERSONAL INJURY/WRONGFUL DEATH					
STATE THE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE THE NAME OF THE INJURED PERSON OR DECEDENT. Personal Injury/Wrongful death - Felix McDermott was given an injection of insulin that he did not need and that was not ordered for him which caused him to develop severe refractory hypoglycemia, which after several hours caused his death.					
11. WITNESSES					
NAME Paul Uribe, Deputy Medical Examiner of the Armed Forces Medical Examiner System		ADDRESS (Number, Street, City, State, and Zip Code) 115 Purple Heart Drive, Dover AFB, Delaware, 19902			
12. (See instructions on reverse). AMOUNT OF CLAIM (in dollars)					
12a. PROPERTY DAMAGE 0.00		12b. PERSONAL INJURY 1,000,000		12c. WRONGFUL DEATH 5,000,000	
12d. TOTAL (Failure to specify may cause forfeiture of your rights). 6,000,000					
I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.					
13a. SIGNATURE OF CLAIMANT (See instructions on reverse side). 			13b. PHONE NUMBER OF PERSON SIGNING FORM 304-758-5053 304-720-6700		14. DATE OF SIGNATURE 8/20/19
CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM The claimant is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages sustained by the Government. (See 31 U.S.C. 3729).			CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS Fine, imprisonment, or both. (See 18 U.S.C. 287, 1001.)		

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of the vehicle or property.

15. Do you carry accident insurance? ☐ Yes If yes, give name and address of insurance company (Number, Street, City, State, and Zip Code) and policy number. ☒ No

16. Have you filed a claim with your insurance carrier in this instance, and if so, is it full coverage or deductible? ☐ Yes ☒ No 17. If deductible, state amount.

0.00

18. If a claim has been filed with your carrier, what action has your insurer taken or proposed to take with reference to your claim? (It is necessary that you ascertain these facts).
Not applicable

19. Do you carry public liability and property damage insurance? ☐ Yes If yes, give name and address of insurance carrier (Number, Street, City, State, and Zip Code). ☒ No

INSTRUCTIONS

Claims presented under the Federal Tort Claims Act should be submitted directly to the "appropriate Federal agency" whose employee(s) was involved in the incident. If the incident involves more than one claimant, each claimant should submit a separate claim form.

Complete all items - Insert the word NONE where applicable.

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE, AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY

Failure to completely execute this form or to supply the requested material within two years from the date the claim accrued may render your claim invalid. A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

If instruction is needed in completing this form, the agency listed in item #1 on the reverse side may be contacted. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplementing regulations. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with the claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file for both personal injury and property damage, the amount for each must be shown in item number 12 of this form.

DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

The amount claimed should be substantiated by competent evidence as follows:

- In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of the injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.
- In support of claims for damage to property, which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested persons, or, if payment has been made, the itemized signed receipts evidencing payment.
- In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, previously reputation of value of official families who have property damaged, or by two or more competitive bidders, and should be certified as being just and correct.
- Failure to specify a sum certain will render your claim invalid and may result in forfeiture of your rights.

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552(e)(3), and concerns the information requested in the letter to which this Notice is attached.

- Authority:** The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

- Principal Purpose:** The information requested is to be used in evaluating claims.
- Routine Use:** See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.
- Effect of Failure to Respond:** Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid."

PAPERWORK REDUCTION ACT NOTICE

This notice is solely for the purpose of the Paperwork Reduction Act, 44 U.S.C. 3501. Public reporting burden for this collection of information is estimated to average 6 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Director, Tort Branch, Attention: Paperwork Reduction Staff, Civil Division, U.S. Department of Justice, Washington, DC 20530 or to the Office of Management and Budget. Do not mail completed form(s) to these addresses.

BASIS OF CLAIM

On April 9, 2018, Felix Kirk McDermott, a patient at the Louis A. Johnson VA Medical Center in Clarksburg, WV (hereinafter sometimes referred to as "VAMC") died as a result of the VAMC breaching its affirmative duty to keep him safe when he was foreseeably injected with a fatal dose of insulin, either negligently or willfully, by an unidentified person while he was an admitted patient of the VAMC. Regardless of the relationship of this unidentified person to VAMC, if any, the VAMC still had an independent duty to protect its patients, including Ret. Army Sgt. McDermott, from foreseeable harm once it knew or should have known that its patients were being wrongfully injected with insulin. Under the facts of this case, the VAMC breached its independent and affirmative duty to protect Ret. Army Sgt. McDermott from foreseeable harm, and as a direct and proximate result of that breach, Ret. Army Sgt. McDermott died. Moreover, if the unidentified person who injected Ret. Army Sgt. McDermott with insulin was an employee, and if this person injected Ret. Army Sgt. McDermott willfully with insulin with an intent to harm him, this act was not committed within the scope of her/his employment with the VAMC/U.S. Government. If the insulin was injected into Ret. Army Sgt. McDermott negligently, then the VAMC is also responsible because the negligence of its employee is imparted onto the VAMC.

Upon information and belief, before April 9, 2018, nine or ten patients of the Louis A. Johnson VA Medical Center in Clarksburg, WV, had died expectedly as a result of unexplained severe hypoglycemia, a/k/a low blood sugar. The employees of the VAMC were aware of each of the unexpected and suspicious deaths. Each of these nine or ten patients had received a large and wrongful injection of insulin in the abdomen that was neither ordered by a doctor or medically necessary. The employees of the VAMC either knew, or should have known, of the wrongful

insulin injections to each of nine or ten patients who died as a result of wrongful insulin injections. Therefore, as of April 6, 2018, when Ret. Army Sgt. McDermott was admitted to the VAMC, there was a reasonably foreseeable risk of harm that more VAMC patients would become victims of the wrongful insulin injections unless the VAMC took affirmative action to protect the VAMC's patients from such foreseeable and wrongful conduct. As a U.S. Veteran hospital, the VAMC had a special relationship with its veteran patients that created an affirmative duty to protect those patients from reasonably foreseeable harm. The VAMC had an affirmative duty to ensure that Ret. Army Sgt. McDermott received high-quality and timely healthcare services in compliance with the standard of care. In this case, the VAMC took custody of Ret. Army Sgt. McDermott, who suffered from dementia and physical disability due to a previous stroke and the VAMC had an affirmative duty to keep him safe. Therefore, there is undoubtedly a special relationship between the VAMC and Ret. Army Sgt. McDermott under the facts of this case. Under West Virginia law, foreseeability is the "primary factor" in determining whether a duty exists. *Robertson v. LeMaster*, 171 W. Va. 607, 301 S.E.2d 563 (1983). The "*ultimate test* of the existence of a duty to use care is found in the *foreseeability* that harm may result if it is not exercised." Syl. Pt. 8, *Aikens v. Debow*, 208 W. Va. 486, 541 S.E.2d 576, 579 (2000) (citing Syl. Pt. 3, *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988)). West Virginia law also requires caregivers, like the VAMC, who accept responsibility for the care of incapacitated elderly people, to protect them from harm.

At the time of Ret. Army Sgt. McDermott's death, nobody at the medical center told his family about the sudden and unexplained hypoglycemia that caused his death. Nor were the family members told that prior to Ret. Army Sgt. McDermott's death, nine or ten other patients at the facility had suffered similar unexplained deaths due to sudden onset of unexplained medical conditions. It was not until months later that government investigators contacted Ret. Army Sgt.

McDermott's daughter Melanie Proctor and advised her of the earlier deaths and their belief that her father's death was not a result of natural causes.

McDermott's Admission and Initial Treatment at the Louis A. Johnson VA Medical Center

Felix Kirk McDermott was a Vietnam Veteran, a retired sergeant after 20 years of active U.S. Army service and subsequently a member of the Pennsylvania National Guard, who was admitted to the Louis A. Johnson VA Medical Center in Clarksburg, WV, on April 6, 2018. Ret. Army Sgt. McDermott came to the facility because he had aspirated on some food and developed aspiration pneumonia. During his initial stay at the facility, Ret. Army Sgt. McDermott's health condition improved.

Ret. Army Sgt. McDermott did not suffer from diabetes. Ret. Army Sgt. McDermott had never been diagnosed with diabetes. Ret. Army Sgt. McDermott did not have a history of ever taking oral medication or insulin injections for diabetes. During his treatment at the VAMC, Ret. Army Sgt. McDermott had his blood glucose levels monitored daily via a fingerstick blood test. Ret. Army Sgt. McDermott's daily fingerstick blood glucose levels were within the normal range of 100-181 mg/dL. There was no medical need for Ret. Army Sgt. McDermott to receive or take insulin and there were no physician orders for insulin during Ret. Army Sgt. McDermott's April 2019 hospitalization.

McDermott's Unexplained Sudden Health Decline and Death

In the early morning hours of April 9, 2018, while still a patient at the Louis A. Johnson VA Medical Center, Ret. Army Sgt. McDermott unexpectedly developed shortness of breath. A fingerstick blood glucose test revealed that Ret. Army Sgt. McDermott had a critically and profoundly low blood sugar level of just 12 mg/dL. Low blood sugar is also called hypoglycemia.

Ret. Army Sgt. McDermott's severely low blood sugar level was so low, that medical efforts to raise his blood sugar level back to normal were unsuccessful. His condition continued to worsen, and he died from severe hypoglycemia at roughly 9:00 a.m. on the morning of April 9, 2018. Employees of the VAMC never explained to Ret. Army Sgt. McDermott's family the unexplained diagnosis of hypoglycemia. Ret. Army Sgt. McDermott's family was only advised of his death. Ret. Army Sgt. McDermott's family had his body sent to a funeral home and prepared for burial. Felix Kirk McDermott was buried on April 13, 2018.

Subsequent Investigation

Under the jurisdiction of the VA Office of the Inspector General, Ret. Army Sgt. McDermott's remains were disinterred on October 23, 2018 and sent to Dover Air Force Base for autopsy because of the suspicious manner of Mr. Dermott's death. During its investigation, VA investigators advised Melanie Proctor, Ret. Army Sgt. McDermott's daughter and the administratrix of his estate, that there was evidence that nine or ten other patients of the Louis A. Johnson VA Medical Center had been wrongfully injected with insulin in their abdomen, thereby causing their deaths. Ms. Proctor was further advised that her father was one of the last known victims.

Exhumation and Autopsy

The exhumation and autopsy confirmed investigators' suspicions that Ret. Army Sgt. McDermott had received an exogenous insulin shot in the left side of his abdomen. That finding was consistent with the clinical history of a profound hypoglycemic event that occurred the morning of April 9, 2018. The autopsy report confirmed that Ret. Army Sgt. McDermott was not a diabetic and had no history of oral hypoglycemic use or previous insulin administration. The

autopsy report also confirmed there were no hospital orders for the administration of insulin. The autopsy report noted that despite Ret. Army Sgt. McDermott's pre-existing health issues, he was showing clear improvement in his medical condition when he was negligently, wrongfully, or intentionally injected with insulin.

Autopsy Findings and VA Investigation

As a result of the investigation, the Armed Forces Medical Examiner ruled that the manner of Felix Kirk McDermott's death is homicide. If the medical examiner's conclusion is correct, Felix Kirk McDermott was murdered while he was in the care and custody of the Louis A. Johnson VA Medical Center despite the VAMC being on notice of the previous wrongful injections. Ret. Army Sgt. McDermott's family has been advised that the VA investigators have a person of interest in the deaths of the multiple VAMC patients. As of the submission of this claim form, that person's identity has not been shared with Ret. Army Sgt. McDermott's family.

The VAMC's Duty and Breach of Duty

Nine or ten other VAMC patients inexplicably died before Ret. Army Sgt. McDermott became a similar fatality victim. These nine or ten prior deaths created an antecedent, independent and affirmative duty to act to protect Ret. Army Sgt. McDermott and other VAMC patients from foreseeable harm before Ret. Army Sgt. McDermott was also wrongfully injected with insulin and killed. The VAMC breached this affirmative duty and was negligent in multiple ways: by failing to thoroughly investigate each of these suspicious deaths and discover the cause of those deaths which resulted from the unwarranted injection of insulin by the unidentified person; by failing to alert Ret. Army Sgt. McDermott or his family that multiple other VAMC patients at the Louis A. Johnson VA Medical Center had died suspiciously; by failing to adequately staff its medical center; by failing to designate each of the other nine or ten deaths as sentinel events despite each

of those deaths meeting the criteria to be designated as a sentinel event, and by failing to identify, report and investigate each sentinel event as required by the standard of care; by failing to initiate a root cause analysis after each of the nine or ten other deaths in order to prevent additional deaths and reduce the potential for patient harm; by failing to have proper reconciliation of medications, including insulin; by failing to have proper oversight by senior VAMC management staff; by failing to properly train VAMC staff; and by failing to warn Ret. Army Sgt. McDermott and his family of other nine or ten deaths. If Ret. Army Sgt. McDermott or his family had been so apprised and properly warned, they could have made an informed choice about whether to seek care at that facility. Due to the negligent concealment of those other suspicious deaths and information, neither Ret. Army Sgt. McDermott nor his family had an opportunity to choose. Moreover, had the VAMC not acted negligently as described above, Ret. Army Sgt. McDermott's untimely death would have been prevented.

The VAMC had a duty to provide reasonable and competent medical care to its patients, including Felix Kirk McDermott. Ret. Army Sgt. McDermott had an absolute right to be free from abuse by the staff at the facility. The VAMC had a duty to protect and prevent its patients, including Ret. Army Sgt. McDermott, from being administered drugs and injections that were not medically necessary. The VAMC had a duty to properly screen and hire its employees. The VAMC had a duty to thoroughly investigate the cause of suspicious and unexpected deaths in order to prevent additional patients, including Ret. Army Sgt. McDermott, from being exposed to the unreasonable risk of being injected with medications meant to harm them. The VAMC had a duty to warn patients of the multiple, suspicious and unexpected deaths so that new patients, including Ret. Army Sgt. McDermott, could make an informed decision about whether to seek care there. The VAMC had a duty not to conceal from patients the multiple, suspicious and unexpected deaths so

that new patients, such as Ret. Army Sgt. McDermott, could make an informed decision about whether to seek care there. The VAMC had a duty to keep good control of its drugs and inventory, including injectable insulin, so that employees of the Louis A. Johnson VA Medical Center did not have unaccounted for access to drugs and injections that could be misused or abused. The VAMC had a duty to properly supervise its employees and not to retain employees that were a danger to patients. Each of these affirmative duties of the VAMC were antecedent and independent of the conduct of person who wrongfully injected Ret. Army Sgt. McDermott.

The VAMC breached each of the above listed duties, which breaches were deviations from the appropriate standard of medical care and were a proximate cause of Ret. Army Sgt. McDermott's injuries and death. As a result of those deviations from the appropriate standard of care, Ret. Army Sgt. McDermott was exposed to unnecessary, foreseeable and preventable dangers, and it was those deviations by the VAMC that were a proximate cause of his death. In addition, if the employee of the Louis A. Johnson VA Medical Center who wrongfully injected Ret. Army Sgt. McDermott in the abdomen with insulin did so negligently, then such negligence is also deviation from the appropriate standard, and the VAMC is responsible for the negligence of its employees under *respondeat superior*.

Monetary Damages and Claim for Relief

As a direct and proximate result of deviations from the appropriate standards of medical care described herein which caused Ret. Army Sgt. McDermott's injuries and wrongful death, his statutory beneficiaries are entitled to all non-economic and economic damages allowed under West Virginia law, including sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent, pain and suffering,

mental anguish, funeral costs of \$7,500 and loss of income to Ret. Army Sgt. McDermott's Estate of approximately \$2,200 per month throughout the remainder of his natural life.

Attachments

1. Letter of Administration from the Tyler County, WV, Commission appointing Melanie Proctor as the Administratrix of the Estate of Felix Kirk McDermott dated July 27, 2018.
2. Autopsy Report of Felix Kirk McDermott dated February 13, 2019 from the U.S. Department of Defense's Armed Forces Medical Examiner System
3. Funeral Bill for the funeral of Felix Kirk McDermott
4. Death Certificate of Felix Kirk McDermott file number 007446.